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NO. 74-844

IN THE SUPREME COURT OF THE
UNITED STATES

MARGUERITE L. ORAM — Appellant

VS.

GENERAL AMERICAN OIL CO.
OF TEXAS, et al — Apellee

PETITION FOR WRIT OF CERTIORARI

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Attorneys for Appellant

NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERMS, 1974

No. _____

MARGUERITE L. ORAM

Petitioner,

vs.

GENERAL AMERICAN OIL CO. OF TEXAS, et al

Respondent

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Texas

Petitioner, Marguerite L. Oram, prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals, Eleventh Judicial District, entered December 7, 1973, Writ of Error refused by Supreme Court of Texas, July 17, 1974, affirming the summary judgment entered by the District

Court of Dallas County, Texas, Fourteenth Judicial District, entered April 5, 1973, and that upon hearing, that the trial and appellate court's rulings upholding summary judgment be reversed and that the cause be remanded to trial court for trial on the merits.

I

OPINIONS BELOW

A. Eleventh Judicial Court of Civil Appeals of Texas, reported in 503 SW 2d 607, December 7, 1974.

B. Supereme Court of Texas, reported in Volume 510 SW 2d, page _____, May 29, 1974.

C. Supreme Court of Texas, reported in Volume 510 SW 2d, page _____, July 17, 1974.

D. Supreme Court of Texas, reported in 513 SW 2d 533, (Motion for rehearing overruled October 2, 1974. See appendix No. 1 attached).

II

JURISDICTION

A. Judgment of the Court of Civil Appeals, 11th Judicial District of Texas, was entered on December 7, 1973, affirming Summary Judgment entered by the 14th District Court of Dallas County, Texas, entered April 5, 1973.

B. An appeal to the Supreme Court of Texas was taken by way of application for a writ of error; the application was

denied by a per curiam opinion on July 17, 1974, (after withdrawing an opinion dated May 29, 1974, in favor of applicant). Motion for rehearing of the application for writ of error was overruled on October 2, 1974.

C. Jurisdiction of the Supreme Court of the United States: (a) Title 28, United States Code Annonated Rule 19, of the Revised Rules of the Supreme Court provides that where a court has so far departed from the accepted and usual proceedings as to call for an exercise of this court's power of supervision, then jurisdiction lies. (b) Amendment V and Amendment XIV to the Constitution of the United States, guaranteeing due process of law, and equal protection of the law.

III

QUESTIONS PRESENTED

The following questions are presented by this petition:

1. Was the denial by the Supreme Court of Texas of Petitioner's prayer for oral argument, to clear up the confusion created by the court in first rendering a per curiam decision in favor of appellant and subsequently rendering a per curiam decision against appellant, a denial of due process of law?

2. Was appellant deprived of property without due process of law as guaranteed by Amendment V to the Constitution of the

United States, when the state probate court approved the sale (99 year lease) of her real estate, while she was under guardianship and in confinement, where state laws concerning sale of a ward's property were not followed?

3. Can a person, after restoration from a state of incompetency, be said to ratify a lease contract, for which court approval was fraudulently gained during her period of incompetency, by her acceptance of the rent payments from the person perpetrating the fraud, when the lessor would have been entitled to rentals anyway; and when the said rent payments were the person's only income, and her refusal to accept the said rent payments would have left her destitute?

4. Was a fact issue properly raised by appellant, so as to defeat a motion for Summary Judgment, when she attempted to show the frauds perpetrated on the probate court, all of which deprived appellant of due process of law when the sale (99 year lease) was approved by the court?

IV

CONSTITUTIONAL PROVISIONS INVOLVED

A. That portion of Amendment V of the Constitution of the United States

which provides that no person shall "be deprived of ... property without due process of law." United States Code annotated, Volume 5 Page 4.

B. That portion of Amendment XIV of the Constitution of the United States which provides in part as follows: "No State shall ... enforce any law which shall abridge the privileges or immunities of a citizen of the United States; nor shall any State deprive any person of ... property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." United States Code Annotated, Volume 13-14 Page 33.

V

STATEMENT OF THE CASE

A. The appellant, Marguerite L. Oram, is the owner of valuable real property in the city of Dallas, Dallas County, Texas, and in the early 1950's many people tried to purchase Mrs. Oram's land, because it was situated on a proposed northbound expressway leading out of the city of Dallas.

B. Through a niece, one Alma Smith, the appellee, General American Oil Company of Texas, tried to persuade Mrs. Oram to sell or give a long-term lease of her land to that company, for the purpose of building a high-rise office building. Being unsuccessful in their attempts, the said appellee induced the niece, Alma Smith, to take out guardianship papers over Mrs. Oram on January 21, 1952, and an order appointing Alma Smith as guardian was enter-

ed February 4, 1952; four days later, on February 8, 1952, the said guardian filed an application with the probate court of Dallas County, for authority to make a 99 year lease, with option to purchase the subject property, in favor of the appellee. On March 18, 1952, the order was entered granting this application, and the lease was actually approved by the court on March 22, 1952, giving the appellee, General American Oil Company, the very thing they were unable to obtain from Mrs. Oram personally before she was placed under guardianship. Three days later, on March 25, 1952, a lunacy trial was held, and on April 10, 1952, Mrs. Oram was admitted to the Terrell State Hospital for the insane.

C. To further show the culpable nature of the actions by the appellee, General American Oil Company of Texas, the facts show that the appellant, Mrs. Oram, had on August 11, 1950, entered into a long-term option-lease agreement on this same property, to one Grover Goode. Only 19 days after Mrs. Oram had been admitted to the Terrell State Hospital, the same Grover Goode filed a lawsuit on his lease, which incidentally was a much better lease than that approved by the probate court, in favor of the appellee. On November 21, 1952, the guardian filed an application in the guardianship proceedings for authority to compromise the Grover Goode suit, and the guardianship order was entered on November 21, 1952, authorizing this. The appellee, General American, intervened in Grover Goode's suit and compromised his claim and bought up his lease; the intervention was filed in

the Goode suit on November 21, 1952.

D. Mrs. Oram was restored to sanity on December 3, 1953, and the record is full of notices, which Mrs. Oram gave to the appellee, General American, after her restoration, to the effect that she would not ratify the lease with option, and in fact notified the appellee that she intended to sue for recovery of her property. She did in fact file the lawsuit, in the form of a bill of review of the orders entered by the probate court in authorizing the sale (99 year lease) of her land, and contending, among other things, the following:

> (1) That the purported sale (99 year lease) did not comply with Article 4178 of the Texas Revised Civil Statutes of 1925 (the law then in effect), because under said law a guardian only had the power to make improvement leases on "wild or unimproved" real property belonging to a ward; but said law did in no way authorize such a lease with "option to purchase." The facts in the record clearly show that not only was appellant's land not "wild or unimproved," but rather was developed urban property with improvements thereon, and was producing an adequate and sufficient income to maintain the appellant at the time in question.
>
> (2) The Texas probate law in effect at the time of appellant's guardianship, Article 4195, provided that real estate could not be sold or leased under guardianship, as long as the ward possessed

other assets with which to meet her needs and to pay costs, etc. The facts reveal that petitioner had $15,000.00 in cash and other valuable assets, and income (including valuable antiques in storage), so this statute was not followed, and appellant did not receive due process of law by the probate court because of this fraud to gain appellant's real estate while these other assets did exist.

(3) A long-term lease (99 years) is considered a sale under Texas probate law. Article 4195A states that property can be sold if there is no revenue produced by the property or if such revenue is insufficient. This property was producing a living for appellant, and she had sufficient other property to make the entire transaction by the probate court a nullity, and its resulting orders void.

(4) An appraisal had to be filed with the probate court on the property to be leased or sold, in order to substantiate the consideration offered by appellee, General American, and the facts proved that the appraisal was, in this case, prepared by an agent of the appellee, General American; and the brief for the court, supposedly to justify the lease-option, was prepared by an attorney retained by General American, (not by the guardian, Alma Smith, or her attorney, and certainly not by the incapacitated appellant).

E. Appellant's bill of review to have these orders of the probate court declared null and void, because of fraud and statutory irregularities in the obtaining of the "lease with option to purchase," by appellee, never reached the trial stage, as the probate court sustained the appellee's motion for summary judgment, as did the 14th Judicial District Court of Dallas County, Texas. An appeal was then taken to the 11th Court of Civil Appeals of the State of Texas, which court approved the trial court's judgment, but they based their opinion on the statute of limitations barring the appellant's cause. An appeal was then taken by way of application for writ of error to the Supreme Court of the State of Texas, which found that the cause was not, in fact, barred by the statute of limitations; that court, after first having ruled in appellant's favor entered a second opinion withdrawing the previous opinion and entered a per curiam opinion that appellant's application for writ of error was refused because they stated appellant had ratified the lease by accepting the monthly lease checks; a subsequent motion for rehearing was overruled.

F. SUMMARY OF FACTS:

(1). A widow woman owned valuable Dallas property

(2). Attempts by oil company to buy her property and her refusal

(3). Oil company co-operated in having widow woman placed under guardianship

(4). Four days after court named guardian filed with court to sell widow's property to Oil Co., based upon appraisals and briefs filed by oil company

(5). Court orders for sale of widow's property were fraudulently obtained, because law was not followed

(6). Widow woman was never given her day in court because trial courts and appelate courts ruled by summary judgment that widow woman ratified the illegally obtained and fraudulent lease, by her acceptance of the lease money

G. Stage at which federal questions were raised:

(1). Due Process. (a) Appellant raised the constitutional ground encompassed by Amendment V of the Constitution of the United States in her original petition for a bill of review of the probate court's orders (see transcript page 11, lines 13, 14 and 15). (b). Further, appellant raised this constitutional ground in her reply brief opposing appellee's motion for summary judgment, by separate subheading and paragraph (see transcript page 143, lines 11 through 21).

(2). Equal Protection of the Laws.

(a) This constitutional ground as guaranteed by Amendment XIV to the Constitution of the United States was raised by appellant in her original petition for bill of review of the probate court's orders (see transcript page 11, line 14).

(3). These constitutional questions were properly and timely raised by pleadings and reply briefs; these questions were never acted upon by any court below, for the reason that summary judgment was entered against appellant; nevertheless, the constitutional questions were raised as indicated, so as to give this court jurisdiction to review the judgment by writ of certorari.

VI

REASONS FOR GRANTING THE WRIT

A. (1) Question 1 Restated:

Was the denial by the Supreme Court of Texas of Petitioner's prayer for oral argument, to clear up the confusion created by the court in first rendering a per curiam decision in favor of appellant and subsequently rendering a per curiam decision against appellant, a denial of due process of law?

(2) Argument

(a) The Supreme Court of the State of Texas created certain confusion, when they first ruled in favor of Appellant on May 29, 1974, by granting her writ of error, and then on July 17, 1974, withdrew the first opinion, and entered a second one, denying appellant's application for writ of error.

(b) In Appellant's motion for rehearing she specifically pled for "oral argument" (See Page 11, line 2 of that motion). The Court's second opinion was entered, without allowing Appellant this right.

(c) Appellant has never been heard in any proceeding because of the effects of Summary Judgment proceedings; then when her attorneys were denied the right to make oral argument in the highest court in the State, it developed again, in this case, which is weighted with "due process of law" violations, that appellant had these constitutional rights denied her.

(d) Justice dictates that where substantial property rights are involved, and where strong allegations, such as fraud, have been raised, and in a case where

a former incompetent is involved, that all avenues of due process of law, and equal protection of the law be guaranteed.

B. (1) Question 2 Restated:

Was Appellant deprived of property without due process of law as guaranteed by Amendment V to the Constitution of the United States when the state probate court approved the sale (99 year lease) of her real estate, while she was under guardianship and in confinement, where state laws concerning sale of a ward's property were not followed?

(2) Argument

(a) In Guardianship matters, where one person is appointed to manage and preserve another's property, the courts, by law, as well as by tradition, have by necessity insisted upon strict rules, where an attempt would be made to sell parts of the ward's estate.

(b) In this case, we have the following violations of the State laws of Texas:

(1)Old Article 4178 of Texas Revised Civil Statutes which dealt with guardian's right

to make valuable improvements on leased property which was "wild and unimproved" land;

(2) Old Article 4195, provided that a guardian could not sell (or long term lease) a ward's property, if the estate possessed other assets with which to meet the ward's needs, and to pay costs, etc.

(3) Old Article 4195A, provided that property of a ward could be sold (leased for 99 years), if the property produced no income, or if the income was insufficient to support itself.

(c) In this case, we have the following suggestions of fraud, perpetrated to induce the Probate Court to approve the illegal sale (99 year lease):

(1) Appellee's attorneys had the scheme all calculated because 4 days after the guardian qualified, the application was filed with Probate Court to have appellant's valuable property sold to appellee. (Remember, the State law required that a showing be made that the ward was to have no other assets before her real property could be sold, or that it be unproductive,

querry: What kind of determination could be made in 4 days.) Fraud or the color of Fraud.

(2) An appraisal had to be furnished to the Probate Court, to justify the consideration offered; one of the appraisals was furnished by appellee's own agents. Fraud or the color of Fraud.

(3) A trial brief had to be filed with the Probate Court, to justify the legality of the proposed sale (99 year lease); it is a fact that this brief was filed by an attorney of the buyer (appellee). Fraud or the color of Fraud.

(d) Summary of Point

The State laws were not followed, but rather, were circumvented, in order to satisfy the ruthless desires of a wealthy Oil Co. to take property by guardianship, which it was unable to obtain prior to guardianship. Appellant's property was not "wild or unimproved," so was not even a proper subject for sale. Her property was producing an income prior to guardianship, from which appellant enjoyed a comfortable living; and furthermore, she had already entered into an option for a lease with one Goode, prior to guardianship, which would have produced plenty of money, so it was certainly fraudulent for the Probate Court to be told that the pro-

perty had insufficient income; and finally appellant had over $15,000.00 worth of other assets, so the law was again violated, when an effort was made to sell her real property, prior to exhausting these other assets "for her use," or "to pay costs of administration."

C. (1) Question 3 Restated:

Can a person, after restoration from a state of incompetency, be said to ratify a lease contract, for which court approval was fraudulently gained by her guardian during her period of incompetency, by her acceptance of the rent payments from the person perpetrating the fraud, when the lessor would have been entitled to rentals anyway, and when the said rent payments were the person's only income, and her refusal to accept the said rent payments would have left her destitute?

(2) Argument

(a) Appellant's brief filed below, cite numerous cases for the proposition that a void act cannot be ratified; and certainly a fraudulently obtained Probate Court Order in the guardianship proceedings would be void. (See Petitioner's Motion for Rehearing, filed July 31, 1974, in the Supreme Court of Texas, page 3 & 4--App III).

(b) It is also settled law, that receipt of payments alone cannot constitute ratification (see Petitioner's Motion for Rehearing in Supreme Court of Texas, page 4, 5, & 6). In this case, Appellant notified appelee, after her restoration to sanity, that she would not accept the lease, and in fact said she would sue, which of course she did (see transcript page 138, line 3, for uncontroverted fact concerning this notice).

(c) Receipt of payments to which one is otherwise entitled does not constitute ratification. (See cases and argument cited in Petitioner's Motion for Rehearing in the Supreme Court of Texas, page 9); and appellant was certainly otherwise entitled to the lease money, because it was leased and producing an income prior to her guardianship, and secondly, she had already made an option for lease of the same property to one Goode, which was a much better agreement than what she had imposed upon her by her guardian and appelliee; furthermore, since the effects of the actions by her guardian and by appellee, amounted to a wasting away of all of appellant's other assets, she found herself in a position of being forced to accept the lease

money to even exist.

D. (1) Question 4 Restated:

Was a fact issue properly raised by appellant, so as to defeat a motion for Summary Judgment, when she attempted to show the frauds perpetrated on the probate court, all of which deprived appellant of due process of law when the sale (99 year lease) was approved by the court?

(2) Argument

(a) Summary Judgment is a harsh type of proceeding, and before a litigant can avail himself of its use, he must comply with all required statutory elements, and the court must then find that there are in the case, no genuine issues of any material fact.

(b) When the issue of fraud was raised by appellant, the mere hint or color of fraud, should have been sufficient to raise a fact question. In the name of justice, what harm could have come by allowing this widow woman the opportunity to present her case in a court of law, when on the surface of the transaction it smacks of the grossest type of fraud.

(c) What were these hints of fraud:

(1) Prior negotiation before guardianship, that failed.

(2) Extremely speedy action in the Probate Court.

(3) Unusual closeness by appellee to guardian, in appellee's supervision, if you will, of the guardian's actions in Probate Court, to gain the results in the quickest time.

(4) The swiftness of the appellee in buying up of appellant's prior option to lease with Goode (which was more favorable to appellant).

E. CONSTITUTIONAL AND JURISDICTIONAL REASONS FOR GRANTING THE WRIT

(a) These constitutional safeguards should, of course, be protected to a party in every case.

(b) This case requires special precautions to guarantee these constitutional rights, because we are:

(1) Dealing with the rights of a widow, who did not even have children to advise her;

(2) Dealing with the rights

of a person placed under guardianship;

(3) Dealing with property allegedly taken from Petitioner, which had substantial value (the lease involved provided for monthly payments of $1,250.00, and an option to purchase amount of $300,000.00 on property admittedly worth millions today).

Fraud Issue:

(a) The Courts below have repeatedly refused to give this woman her day in court, to see whether she could prove that she was defrauded; once the question of fraud was raised, the constitutional guarantee of due process is brought into the case, especially where Summary Judgment has been ordered against the person raising the fraud question, because the nature of fraud itself suggests an issue of a material fact question, which is repugnant to the very thought of Summary Judgment.

(1) A refusal by the lower courts to grant Appellant her Bill or Review of the allegedly void probate court orders, would clearly be a denial of the constitutional guarantees of the

V and XIV amendments, and thus bring into play, the jurisdiction of this court (See Smith Vs. Smith, 210 Fed Rep. 947, a 1914 Federal landmark case which held that a probate court's orders, ex parte in nature, like other judgments, are subject to attack, and rendered inoperative, when procured by fraud).

(b) The lower courts' rulings in effect holds that appellant ratified this alleged fraudulently obtained lease; appellant contends the lease was fraudulently obtained because:

(1) She had repeatedly refused to contract with appellee, prior to her guardianship;

(2) Her property was obtained by appellee, only after appellant was placed under guardianship.

(3) The lease was obtained by appellee working unconscionably close with guardian, by furnishing its own appraisals and briefs as to legality, for use by the guardian in the Probate Court.

(4) The property in question should not have been a

part of the guardianship assets in the first place, because prior to guardianship, the ward had committed the property by option to lease, to a third party.

(c) Plenary consideration of this case is essential, because the fraud alleged to have occurred in the Probate Court is of such magnitude, as to bring a Review within the jurisdiction of this Court.

(1) A trial is mandatory in this case, to determine whether the Texas Probate Code was violated, by those who attempted to use guardianship as a vehicle to wrench from appellant her valuable property.

3. No Arms Length Transaction

(a) Extraordinary care in dealing with the rights of an elderly widow, without immediate family, who was legally incapacitated (by guardianship) must be scrupulously protected; there cannot even be a hint of fraud or color of fraud.

(b) The appellees were astute, zealous business men of large corporations, and of proven

business prowess, so they must be tested by a different standard, in order to insure the constitutional safeguards.

4. Justice

(a) The constitutional guarantees of due process and equal protection of the laws, demands that justice be done by allowing appellant her day in court.

(b) Justice requires, in a case of Summary Judgment, that there be no issue of any material fact, before it is granted.

(1) Once fraud is made an issue, can anyone contend that this would not be "material" in any type of litigation?

(c) Justice should have prevailed in the State Supreme Court, by allowing appellant's attorneys to make an oral argument as requested.

F. CONCLUSION

(1) When the wealthy and powerful are dealing with the weak and lowly, should not the standards of due process and equal protection be carefully watched, particularly where

the complaint is made that rights have been tranpled upon?

(2) Appellant, who was living comfortably before she found herself in the nightmare of an insane assylum, and who attempted to defend herself by spending her meager estate, or had it wasted away by unnecessary guardianship and lunacy court costs and attorneys fees, was criticized for having accepted lease money from the very ones who she claims defrauded her; (when the money was rightfully hers anyway); and by this act of having accepted the lease money she has been told by two trial courts and two appellate courts, over a span of 20 years, that she ratified the fraud perpetrated upon her. If this be the law of the land, then God help us all.

Respectfully submitted,
Earl J. Wentwroth
William H. Haight

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CERTIFICATE OF SERVICE

I, the undersigned attorney for Appellant, do hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been mailed by certified mail to the attorneys of record representing the Respondents herein, as shown hereunder, dated this 30th day of December, 1974.

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APPENDIX I

Judgment Court of Civil Appeals
Of the State of Texas

December 7, 1973

JUDGMENT COURT OF CIVIL APPEALS

Marguerite L. Oram

Appellant

V. No. 4657

General American Oil Company of Texas, et al

Appellee

Appealed from the 14th Judicial District Court of Dallas County.

This is a summary judgment case. Marguerite L. Oram brought in the Probate Court of Dallas County a bill of review seeking to have declared null and void previous orders of the court. The orders authorized the execution of a lease with option to purchase certain property of Marguerite Oram. The lease named General American Oil Company, lessee. It was executed by Alma L. Smith, guardian of the person and estate of Marguerite Oram, during a period when Marguerite Oram had been adjudged a person of unsound mind. After restoration of mental competency, Marguerite Oram instituted these proceedings on May 9, 1958, alleging fraud and statutory irregularities in the execution of the lease.

The named defendants were General American Oil Company of Texas - lessee of appellant's land under guardian's lease; Meadows Building Corporation - sublessee from General American; F. H.

Connally, W. H. Sparks, and J. K. Rigsbee, trustees of General American Employees Retirement Plan; Magnolia Petroleum Company - sublessee from General American; Prudential Insurance Company of America - mortgagee for loan to General American to construct improvements; Lawyers Surety Corporation - surety on guardian bond for Alma L. Smith; Grover G. Goode - potential lessee from apellant prior to insanity; A. H. Meadows - lessee of appellant's land under guardian lease; Marvin R. Smith - husband of guardian Alma L. Smith; Alma L. Smith, individually and in her capacity as former Guardian of the Person and Estate of Marguerite L. Oram. The probate court sustained the defendants' motions for summary judgment as did the district court on appeal. Marguerite Oram appeals from that judgment.

Marguerite Oram contends the trial court erred in sustaining the defendants' motions for summary judgment because material fact issues were raised as to limitations, laches, ratification, estoppel, waiver, fraud and statutory irregularities surrounding the guardian's lease of her land.

In support of their motions for summary judgment the defendants presented, along with other evidence, properly certified copies of the proceedings in the Probate Court of Dallas county which authorized the execution of the lease by the guardian, a copy of the lease, properly certified copy of the order of the probate court dated December 3, 1953, declaring Marguerite Oram to be a person of sound mind, the final account of the guardian which reflected rents from General American Oil Company of Texas,

the waiver of citation executed by Marguerite Oram waiving the necessity of service as required by law of the court's hearing on the guardian's final account, and the probate court's order discharging the guardian, Alam L. Smith and her surety, dated December 4, 1953.

Marguerite Oram urges that prior to the enactment of Section 31, Probate Code, V.A.T.S., in 1955, a four year statute of limitation was applicable to the bringing of a bill of review. She contends that this action is brought within that period when the provisions of Article 5539a are applied. Her affidavit opposing defendants' motions for summary judgment recites in part:

> "'That this petition for a bill of review is properly before this court, in that the same was originally filed in the 14th Judicial District Court of Dallas County, Texas on the 29th day of August 1956 as a part of Cause No. 15727; that thereafter, and on the 10th day of March, 1958 the said District Court ordered the said cause, insofar as it constituted a direct attack upon the guardianship in question and in the nature of a bill of review and the same being this cause of action, dismissed; that thereafter and on May 9, 1958, and within 60 days of said order, this cause was filed herein. That such petition not attached and such dismissal in such District Court, and the order thereon, is marked Exhibit 'B' and attached to this affidavit and adopted as a part hereof just the same as though set forth in full herein.'"

Article 5539a, V.A.T.S., provides:

> "When an action shall be dismissed in any way, or a judgment therein shall be set aside or annulled in a direct proceeding, because of a want of jurisdiction of the Trial Court in which such action shall have been filed and within sixty (60) days after such dismissal or other disposition becomes final, such action shall be commenced in a Court of Proper Jurisdiction, the period between the date of first filing and that of commencement in the second Court shall not be counted as a part of the period of limitation unless the opposite party shall in abatement show the first filing to have been in intentional disregard of jurisdiction."

Marguerite Oram contends that since the statute of limitation was tolled during the time the original suit was filed in the improper court and the present suit was filed within 60 days from the time the original suit was dismissed for lack of jurisdiction, her bill of review was not barred by the four year statute of limitations. Without passing upon the issue of the appropriateness or inappropriateness of the four year limitation period, we will examine her contention.

Article 5539a affords relief only when the dismissal of the former action was for lack of jurisdiction; if the court had jurisdiction the statute is not tolled. Garrett v. Hartford Accident & Indemnity Co., 107 S.W.2d 726 (Tex.Civ.App. 1937, no writ hist.); Binge v. Gulf Coast Orchards Co., 93

S.W.2d 813 (Tex.Civ.App. 1936, dismissed), see also 4 McDonald, Tex. Civ.Practice Pg. 17.20

The order of March 10, 1958, attached as Exhibit 'B' to Marguerie[illegible] Oram's affidavit recites that "the plea in abatement of defendants . . .to plaintiff's first amended original petition be and the same are hereby sustained, and that plaintiff's first amended original petition and the cause of action asserted therein be, and the same is, hereby dismissed at plaintiff's cost, to which action of the court plaintiff then and there duly excepted.

Plaintiff having requested leave to amend leave is hereby granted to amend in conformity with this order within 20 days."

The record before this court does not include plaintiff's first amended original petition referred to in the above order. The order does not reflect a dismissal for lack of jurisdiction. It does appear from the order that Lawyers Surety Corporation was not a party to the cause.

The court in Watson v. General Motors Corporation, 479 S.W.2d 104 (Tex.Civ.App. Houston (1st Dist.) 1972, writ ref.n.r.e.) stated:

> ". . .The burden of proving the facts relied on to bring the case within Art. 5539a, supra, rested on appellants. It was necessary that appellants prove that within the limitation period a suit was filed; that this suit was dismissed because of a want of jurisdiction in the court in which it was

filed; that within sixty days after such dismissal became final the action was commenced in a court of proper jurisdiction."

Our Supreme Court in Gibbs v. General Motors Corporation, 450 S.W.2d 827 (Tex.Sup.Ct. 1970), stated the rule to be followed in a summary judgment proceeding as follows:

". . .In such cases, the question on appeal, as well as in the trial court, it not whether the summary judgment proof raises fact issues with reference to the essential elements of a plaintiff's claim or cause of action but is whether the summary judgment proof establishes as a matter of law that there is no genuine issue of fact as to one or more of the essential elements of the plaintiff's cause of action."

See also 4 McDonald, Tex.Civ.Practice Section 17.26.2

The record before this court establishes that the present action was filed more than four years after Marguerite L. Oram was restored as a person of sound mind. It was necessary for her to establish the applicability of Article 5539a, supra, to avoid limitation. An essential element of its application was a showing of the dismissal of the former action for lack of jurisdiction.

In a summary judgment case where the defendant established limitation and the plaintiff failed to avoid its application, the court said in Birdwell v.

American Bonding Company, 337 S.W.2d 120 (Tex.Civ.App. Fort Worth 1960, writ ref. n.r.e., 81 S.Ct. 1920):

> ". . .At such stage of summary judgment proceedings a plaintiff is burdened with the obligation to show that he has receivable evidence to justify his delay, else there would be a complete failure by him to raise an issue thereon. In other words, we are of the opinion that a defendant is entitled to prevail in his motion for summary judgment based upon demonstration that the claim is barred by the affirmative defense of limitation in the absence of the plaintiff's ability to explain and excuse his delay by discharging his correlative burden (shifted to him as the result of the proof by the defendant) of specifying some evidence which would change the result otherwise undoubtedly achieved by the defendant as the moving party. McDonald, Texas Civil Practice, 'Judgments', sec. 17.26.1 '(Summary Judgments)-B. When Summary Judgment Proper'; LeMond and Kreager's article on 'The Scope of Pleading as Proof in Summary Judgment Procedure' 30 Tex.Law Review, pp. 613-619."

See also Pierce v. Estate of Haverlah, 428 S.W.2d 422 (Tex.Civ.App. Tyler, 1968, writ ref. n.r.e.).

There is no summary judgment proof in the record before this court that the first cause of action brought by Marguerite Oram was dismissed for lack of jurisdiction. The legal conclusions

contained in Marguerite Oram's affidavit do not constitute valid summary judgment proof. As stated in Bestwall Gypsum Division v. Padgett Bros. Drywall, 425 S.W.2d 844 (Tex.Civ.App. Houston (1st Dist.) 1968, no writ hist.):

> "Statements in affidavits which are conclusions of law are insufficient to raise a fact issue in a summary judgment proceeding. Marsalis v. Garre, 391 S.W.2d 522 (Tex.Civ.App. 1965, writ ref. n.r.e.); Farmers State Bank v. First State Bank of Liberty, 317 S.W.2d 768 (Tex.Civ.App., 1958, no writ hist.); Mason v. Mid-Continent Supply Co., 374 S.W.2d 922 (Tex.Civ. App., 1964, writ ref., n.r.e.)."

Marguerite Oram has failed in her burden and the granting of the summary judgment against her was correct. Gulf, Colorado & Santa Fe Railway Company v. G. C. McBride, 322 S.W.2d 492 (Tex. Sup. 1958).

In view of our holding on the issue of limitations, the other points of error are immaterial. The judgment is affirmed.

(Austin McCloud, Chief Justice, not participating)

RALEIGH BROWN

December 7, 1973 ASSOCIATE JUSTICE

APPENDIX II

Certificate from Supreme Court
of the State of Texas covering
Certified copies

IN THE SUPREME COURT OF TEXAS

AUSTIN

++++

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the following, to-wit:

1. Application for writ of error
2. Supplemental brief of petitioner
3. Petitioner's answer to respondents' motions for rehearing
4. Petitioner's motion for rehearing
5. Orders of the Supreme Court of Texas on application for writ of error and motion for rehearing, with per curiam opinion

constitute the certified record requested by petitioner in the case of MARGUERITE L. ORAM vs. GENERAL AMERICAN OIL COMPANY OF TEXAS ET AL, No. B-4448, from Dallas County, Eleventh District, as the originals of such instruments appear of record on file and in the minutes of said Court.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, on this 12th day of December, 1974.

Garson R. Jackson,
Clerk

APPENDIX III

Appellant's Motion for Rehearing in the Supreme Court of the State of Texas

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APPLICATION NO. B-4448

IN THE SUPREME COURT OF TEXAS

MARGUERITE L. ORAM — PETITIONER

VS.

GENERAL AMERICAN OIL COMPANY
OF TEXAS, ET AL — RESPONDENTS

From the Court of Civil Appeals for the

Eleventh Supreme Judicial District

PETITIONER'S MOTION FOR REHEARING

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APPLICATION NO. B-4448

IN THE SUPREME COURT OF TEXAS

MARGUERITE L. ORAM — PETITIONER

VS.

GENERAL AMERICAN OIL COMPANY OF TEXAS, ET AL — RESPONDENTS

From the Court of Civil Appeals for the

Eleventh Supreme Judicial District

of Texas at Eastland

PE:TITIONER'S MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

Now comes Petitioner, Marguerite L. Oram, and respectfully submits the following grounds for rehearing.

POINTS OF ERROR

POINT ONE

THE SUPREME COURT ERRED IN HOLDING THAT PETITIONER HAD RATIFIED THE SUBJECT LEASE.

POINT TWO

THE SUPREME COURT ERRED IN NOT HOLDING THAT

THE LOWER COURTS ERRED IN SUSTAINING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BASED ON LACHES.

POINT THREE

THE SUPREME COURT ERRED IN NOT HOLDING THAT THE LOWER COURTS ERRED IN SUSTAINING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT BASED ON ESTOPPEL AND WAIVER.

POINT FOUR

THE SUPREME COURT ERRED IN NOT HOLDING THAT THE LOWER COURTS ERRED IN SUSTAINING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT BECAUSE MATERIAL FACT ISSUES EXISTED AS TO FRAUD AND STATUTORY IRREGULARITIES SURROUNDING THE GUARDIAN'S LEASE OF PETITIONER'S LAND.

POINT ONE RESTATED

THE SUPREME COURT ERRED IN HOLDING THAT PETITIONER HAD RATIFIED THE SUBJECT LEASE.

STATEMENT, ARGUMENT AND AUTHORITIES

Respondents' Motions for Summary Judgment were based on limitations, laches, ratification, estoppel and waiver. The Probate Court and the District Court affirmed the Motions without specifying the defense upon which their decision was based. The Eastland Court of Civil Appeals affirmed the summary judgments specifically on the basis of limitations. This honorable Court by per curiam opinion has held that the Court of Civil Appeals erred in holding that Petitioner's courses of action was barred by limitations. However, this Court has held that the summary judgments were proper because of the defense of ratification, to wit, Petitioner's acceptance of Respondents' monthly rental payments constituted ratification of the subject lease.

This Court's holding on ratification is in error for the following reasons:

A. Void acts cannot be ratified.

B. Receipt of payments alone cannot constitute ratification.

C. Receipt of payments to which one is otherwise entitled does not constitute ratification.

A. Void Acts Cannot Be Ratified

The probate court's only authority for authorizing a sale or lease of Petitioner's land by the guardian is derived from statutes, Art. 4174, 4177, 4178, 4195 and 4195a, Appendix, Vol. 17B, Probate Code, V.A.T.S. Petitioner's affidavit stated the facts relevant to the inapplicability of these statutes,* thereby creating at least fact issues concerning the probate court's authority to authorize the "Lease with Option to Purchase" to Respondents. If upon a determination of the fact issues, the probate court in fact did not have authority to authorize the "Lease with Option to Purchase" then the execution of same is void. "When the probate court, on a duly verified application, orders a sale of a ward's land under circumstances which do not exist, and for purposes not authorized by statute, its acts are nullities and the sale void. Neal et al. v. Holt et al., Tex. Civ. App., 69 S.W. 2d 603." Simpson v. Booth, 163 S.W.2d 1080 (Tex.Civ.App. 1946, refused want of merit).

A void sale, contract or other act cannot be ratified. "If the order of sale was a nullity, the confirmation of such sale could not legalize it." Neal v. Holt, 69 S.W.2d 603 (Tex.Civ.App. 1934, writ refused). "The appellee insists that even though the proceedings which resulted in the sale ... were void, yet there has been subsequent ratification by Mrs. Hardin. Illegal and void

*For a more detailed discussion, please see Petitioner's Application for Writ of Error, Point Four.

acts ... cannot be ratified by the principal for the obvious reason that there is nothing to ratify." Sullivan v. Hardin, 102 S.W. 2d 1110 (Tex. Civ. App. 1937, n.w.h.). "An illegal contract cannot be ratified by either party." Continental Fire and Casualty Ins. Corp. v. American Mfg. Co., 221 S.W.2d 1106 (Tex. Civ. App. 1949, writ refused).

Under the authorities cited above, this Court has erred by holding that Petitioner has ratified the "Lease with Option to Purchase," if the Probate Court's order authorizing such Lease is void. The question of whether the order is void depends upon the determination of fact issues which determine the applicability of the statutes authorizing a guardian's sale or lease. Such fact issues must be determined upon a trial and cannot be determined by mere summary judgment proceedings.

B. Receipt of payments alone cannot constitute Ratification

In holding that there has been a ratification, this Court recites for its holding only the fact that Petitioner has received rental payments. No other basis for the holding is recited. As authorities this Court cites Rosenbaum v. Texas Bldg. & Mrttg. Co., 167 S.W. 2d 506 (Tex.Sup. 1943); Powell v. Rockow, 92 S.W. 2d 437 (Tex. Sup. 1936); and Webb Materials, Inc. v. Lacey, 364 S.W. 2d 473 (Tex. Civ. App. 1963, writ ref'd, n.r.e.). An examination of these cases reveals that they are inapplicable to Petitioner's case on which there has never been a trial on the merits.

In the Rosenbaum case, the Court stated that receipt of semiannual bond interest payment was a positive act of ratification. However, the Court did not say that such receipt alone constituted ratification. Rather, the Court states further that the petitioner had stated under oath that she was a stockholder in the respondent corporation. The Court then held that under these

particular facts, there had been a ratification. But even more important, the Court's holding was based on all the facts and circumstances produced in the jury trial. It was not a summary judgment proceeding. Further, the Court even allowed petitioner another trial with the right to recast her pleadings. Petitioner in the case at bar is still seeking her first trial on the merits, at which time all the facts and circumstances can be produced.

The Powell case did not even concern receipt of money as a basis of ratification. Rather, the Court held that it would be manifestly inequitable to use property during the full term of a lease and then attempt to cancel a note for payment of the furnishings. This holding, like in the Rosenbaum case, was based on all the evidence produced during a jury trial. In the case at bar, can this Court hold as a matter of law based on mere summary judgment evidence that Petitioner's receipt of monthly rental payments alone constitutes ratification when the other facts are that she had been insane for one and one-half years, notified respondents within a very short period after her release from the asylum that she intended to dishonor the lease, and in fact had already leased the property before her commitment to the asylum and would have received the same or greater rental payments under such prior lease?

In the Webb case, the Court found ratification, not based upon the receipt of four years of rental payments alone, but also based upon the fact that although Lacey knew of the fraud he set idly by for over two years and said nothing about recission of the lease. This holding was also based on all the evidence produced durig the jury trial. Petitioner in the case at bar did not set idly by, but instead, notified Respondents almost immediately and on several occasions of her intent to rescind the Lease.

These three cases cited by this Court in its

opinion have two elements in common - they all were based on evidence presented during a full-scale jury trial and they all concerned the question of ratification based in part upon material facts other than the receipt of money. Likewise, all these cases are consistent with this Court's holding in De Shazo v. Wool Growers Central Stor-Co., 162 S.W. 2d 401 (Tex. Sup. 1942) in which it was held:

> Of course, we do not hold that the receipt of the proceeds derived from converted property in no instance amounts to ratification or estoppel. Such receipt may or may not constitute ratification or estoppel, depending on the surrounding facts and circumstances. *** What we hold is that such acceptance alone does not constitute ratification or work an estoppel.

This Court's per curiam opinion in the case at bar is in direct conflict with the De Shazo holding. This Court has held that Petitioner's receipt of rental payments constitutes ratification regardless of "whatever her mental reservations have been." Furthermore, this Court's holding is based merely on summary judgment evidence rather than on all the evidence which would be introduced upon a trial on the merits. Even the De Shazo opinion was based on all the evidence presented during a jury trial. The facts underlying ratification are for the jury to decide upon a trial. "Such matters as affirmance, acquiescence, and ratification present fact questions." Burleson v. Earnest, 153 S.W.2d 869 (Tex. Civ. App. 1941, refused want of merit). This Court has taken the place of the jury, and with limited summary judgment evidence has determined as a matter of law that because Petitioner has received the rental payments she shall not be entitled to a trial on the merits, despite the fact that within four months after being released from one and one-half years in the insane asylum she sent a telegram to Respondents notifying them of her intention to sue to rescind the lease,

despite the fact that she relied upon and in fact has used a large amount of the rental payments to pay attorneys in her attempt to rescind the lease, despite the fact that prior to her commitment to the asylum she had leased the same property on more favorable terms than the terms of the "Lease with Option to Purchase" to Respondents, despite the fact that Respondents had to pay the leases under the prior lease a settlement amount in order to legally terminate the valid lease Petitioner had previously executed, despite the fact that under the prior lease Petitioner would have been receiving the same or greater rental payments as she has been receiving from Respondents, despite the fact that the rental payments constitute a mere average living today for Petitioner compared to being a multi millionnaire were it not for the Option to Purchase at a small fixed price which is contained in Respondents' Lease but was not contained in the lease previously executed by Petitioner, and despite the fact that Petitioner has raised fact issues concerning the fraud to which she and the probate court have been subjected.

Ratification is equitable in nature. The underlying doctrine is to prevent one party from accepting benefits under a voidable agreement and thereby giving the impression that the party intendes to recognize and abide by the agreement, such as was done in the Webb case, supra. However, accepting benefits alone does not constitute ratification, as in the De Shazo case, supra. If the acceptance of the benefits is accompanied with surrounding facts and circumstances which indicate that the other party clearly understands that such acceptance does not indicate an intention to abide by the voidable agreement, then there is no ratification. Clearly, Respondents knew, from the time they received Petitioner's first telegram stating her intention to file suit, that her acceptance of the rental payments did not constitute her intention to abide by the Lease. She even notified them to pay part of the rental directly to the attorneys who were handl-

ing her lawsuit. Respondents well knew before the construction of their building was one-third underway that Petitioner had no intention to ratify the Lease, yet they proceeded with their construction and now allege that because Petitioner accepted the rental payments, (which she would have received anyway under her prior lease) she should not have her trial to prove that she was defrauded out of her property while she was insane. Surely, the equitable defense of ratification was not intended to result in such an inequity as under these circumstances.

Furthermore, it is well established in law that one cannot ratify an act without full knowledge of the facts and circumstances. Respondents, in their summary judgment proof, have not shown that Petitioner accepted the rental payments with full knowledge of the facts and circumstances surrounding their Lease from Petitioner's guardian during Petitioner's insanity. Respondents having failed to meet this summary judgment burden, Petitioner is entitled to a trial on the merits.

C. Receipt of Payments to which one is otherwise entitled does not constitute ratification

Under the lease which she executed prior to being committed to the asylum, Petitioner was entitled to $1,250.00 per month, the same amount she has been receiving from Respondents from the time they paid for an agreed settlement in the cancellation of Petitioner's first lease. Petitioner has been entitled to $1,250.00 per month, and therefore, receipt of same cannot constitute ratification. There is no ratification "...where the principal is legally entitled to what he has received without assenting to the act of the agent." 2A C-J.S. 685, Agency, Section 86.

POINT TWO RESTATED

THE SUPREME COURT ERRED IN NOT HOLDING THAT THE LOWER COURTS ERRED IN SUSTAINING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT BASED ON LACHES.

POINT THREE RESTATED

THE SUPREME COURT ERRED IN NOT HOLDING THAT THE LOWER COURTS ERRED IN SUSTAINING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT BASED ON ESTOPPEL AND WAIVER.

POINT FOUR RESTATED

THE SUPREME COURT ERRED IN NOT HOLDING THAT THE LOWER COURTS ERRED IN SUSTAINING RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT BECAUSE MATERIAL FACT ISSUES EXISTED AS TO FRAUD AND STATUTORY IRREGULARITIES SURROUNDING THE GUARDIAN'S LEASE OF PETITIONER'S LAND.

STATEMENT, ARGUMENT AND AUTHORITIES

(See Petitioner's Application for Writ of Error Under These Points).

SUMMARY

This Court has erred in not granting Petitioner a trial on the merits. The Court's holding of ratification is error because Petitioner cannot legally ratify a void act and any lease approved by the probate court in violation of the guardian-ward leasing statutes is void. Furthermore, under the established Supreme Court precedent, Petitioner's acceptance of rental payments alone cannot constitute ratification, nor can such acceptance constitute ratification where Petitioner was entitled to such payments even before the Lease to Respondents. Petitioner should be given her "day in court."

PRAYER

WHEREFORE PREMISES CONSIDERED, Petitioner prays that this Court grant Petitioner's Motion for Rehearing, withdraw its Per Curiam opinion and grant Petitioner's Application for Writ of Error, and upon oral argument, reverse the lower courts' decisions and remand this cause to the probate court for a trial on the merits.

Respectfully sumitted,

EARL J. WENTWORTH
126 Main Plaza
San Antonio, Texas 78205

ATTORNEY FOR PETITIONER

BY: _____
JERRY BOLIN
1026 N. McDonald
McKinney, Texas 75069

OF COUNSEL

CERTIFICATE OF SERVICE

I certify that on this 31st day of July, 1974, a true and correct copy of the foregoing Petitioner's Motion for Rehearing was mailed to Respondents' attorneys:

1. Mr. Walter H. Mizzell
   Thompson, Knight, Simmons and Bullion
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   Dallas, Texas 75201

2. Mr. H. Louis Nichols
   Saner, Jack, Sallinger and Nichols
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Dallas, Texas

Jerry Bolin

APPENDIX IV

Orders of the Supreme Court
of the State of Texas
on Application for Writ of Error and
Motion for Rehearing, with Per Curiam
Opinion

IN THE SUPREME COURT OF TEXAS

NO. B-4448 July 17, 1974

MARGUERITE L. ORAM	I	
	I	
VS.	I	FROM DALLAS COUNTY,
	I	ELEVENTH DISTRICT
GENERAL AMERICAN OIL	I	
COMPANY OF TEXAS ET AL	I	

This cause came on to be heard on motions for rehearing, filed on behalf of all respondents, and said motions having been duly considered, it is ordered that the motions be, and hereby are, granted.

It is further ordered that the opinion delivered herein on May 29, 1974 be, and hereby is, withdrawn, and the judgment entered on May 29, 1974 be, and hereby is, set aside, and the following order is here now entered in the case to-wit:

Application of petitioner for writ of error to the Court of Civil Appeals for the Eleventh Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused, in accordance with the Per Curiam Opinion herein this day delivered.

It is further ordered that applicant, Marguerite L. Oram, and her surety, Aetna Casualty & Surety Company, pay all costs incurred on this application.

++++++++++++++++++++

NO. B-4448 October 2, 1974

MARGUERITE L. ORAM	X	
	X	
VS.	X	FROM DALLAS COUNTY,
	X	ELEVENTH DISTRICT
	X	
GENERAL AMERICAN OIL	X	
COMPANY OF TEXAS ET AL	X	

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

++++++++++++++++++++

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do dhereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 12th day of December, 1974.

GARSON R. JACKSON, Clerk

By_____
Mary M. Wakefield,
Deputy

IN THE SUPREME COURT OF TEXAS

NO. B-4448

MARGUERITE L. ORAM,	I	
	I	From Dallas County
Petitioner	I	Eleventh District
	I	
v.	I	
	I	
GENERAL AMERICAN OIL	I	On Motion for Re-
COMPANY OF TEXAS, et al,	I	hearing
	I	
Respondents	I	

PER CURIAM

Petitioner brought a bill of review attacking orders entered in 1952 by the Probate Court of Dallas County. That Probate Court and, after appeal, the District Court entered summary judgment denying all relief to petitioner. The Court of Civil Appeals affirmed. 503 S.W.2d 607.

The basis of the affirmance of the summary judgment by the court of Civil Appeals is the pleading of the statute of limitations by defendants (respondents) and the conclusive proof that more than four years[1] elapsed between the date when the petitioner was competent to bring this action (December 3, 1953) and the filing of this suit in the Probate Court on May 9, 1958. However, the petitioner filed an affidavit in response to the motion for summary judgment in which she stated that this same action was first filed in the 14th Judicial District Court of Dallas County on August 29, 1956, which action was then dismissed on March 10, 1958 because

---

1. The general limitation statute of four years is applicable in this case under the authority of Parmley v. Parmley, 149 S.W.2d 647 (Tex. Civ. App. 1941, writ ref'd). The period is now two years by provision of V.A.T.S. Probate Code, Sec. 31.

it constituted a direct attack upon the orders of the Probate Court, and that the present suit was properly filed within 60 days thereafter in the Probate Court. A copy of the March 10, 1958 judgment of dismissal of the District Court was attached to petitioner's affidavit. If these statements are accurate, limitations did not run against petitioner after August 29, 1956. Article 5539a, Vernon's Ann. Civ. St. That would mean that the suit was not barred by limitations.

It has been held below that petitioner had the burden of establishing the applicability of Article 5539a and that she failed to show that the first action was dismissed for lack of jurisdiction since the judgment does not expressly state this to be the cause for dismissal. The holdings and opinions of the Supreme Court are to the contrary with respect to the burden of petitioner. The non-movant has no burden in response to a summary judgment motion unless the movant has conclusively established his defense. Swilley v. Hughes, 488 S.W.2d 64 (Tex. 1972); Torres v. Western Cas. and Sur. Co., 457 S.W.2d 50 (Tex. 1970). The defense of the movants in this case was the bar of limitations. This bar was not established conclusively since the contention was being made that under Article 5539a limitations ceased to run on August 29, 1956. It would be a different matter if the movant had established the limitations defense and the non-movant had then sought to interpose an estoppel to avoid movant's limitations defense. The non-movant would then be required to raise a fact issue with respect to the estoppel. Nichols v. Smith, 507 S.W.2d 518 (Tex. 1974); "Moore" Burger, Inc. v. Phillips Petroleum Co., 492 S.W. 2d 934 (Tex. 1973).

The summary judgment was clearly correct, however, because the pleading of the plaintiff and the proof established that the plaintiff has ratified and affirmed the acts of the guardian and the orders of the Probate Court which this suit attacks. The objective of the suit is to

set aside a 99 year lease of ten acres of land which was entered into on behalf of plaintiff (petitioner) Marguerite L. Oram by Alma L. Smith as guardian of her person and estate during plaintiff's mental incapacity. Beginning in 1953 when it was decreed that Mrs. Oram had been restored to sound mind and when the probate proceeding was closed with an order approving the final accounting of the guardian, General American Oil Company has paid to Mrs. Oram $1250 each month as rental under the terms of the lease. She has accepted these monthly payments and has on some occasions directed that portions of the rental should be paid to her attorneys or creditors. She has been fully aware of the terms of the lease and by continuing to accept the benefits of performance thereunder by the lessee, she has ratified and affirmed the lease as her own act.

It is true that Mrs. Oram has written to the lessee objecting to the lease, and in her petition she states that she did not intend to ratify the lease by her acceptance of the rental payments. Whatever her mental reservations have been, her acceptance of the payments are inconsistent with the intention to avoid the lease. These acts have recognized the lease as subsisting and binding. The effect is to waive or abandon any right of rescission or of attack upon the initial invalidity, if any, of the lease. Rosenbaum v. Texas Bldg. & Mortg. Co., 140 Tex. 325, 167 S.W.2d 506 (1943); Powell v. Rockow, 127 Tex. 209, 92 S.W.2d 437 (1936); Webb Materials, Inc. v. Lacey, 364 S.W.2d 473 (Tex. Civ. App. 1963, writ ref'd n.r.e.).

The motions for rehearing filed by all respondents are granted. The former judgment is set aside. The opinion of May 29, 1974 is withdrawn. The application for writ of error of Marguerite L. Oram is refused, no reversible error.

OPINION DELIVERED: July 18, 1974.